

NO. 48180-4-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

MALACHI W. WATKINS,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY

The Honorable Gregory M. Gonzales, Judge
Cause No. 15-1-01230-4

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not dismissing count I, failure to register as a sex offender, for failure of the information to allege all of the elements of the offense.
02. The trial court erred in not dismissing count II, tampering with a witness, for lack of sufficient evidence.
03. In finding Watkins guilty of tampering with a witness, the trial court erred in entering FINDINGS OF FACT 1.11, 1.12 and 1.14 as fully set forth herein at page 6.
04. In finding Watkins guilty of tampering with a witness, the trial court erred in entering CONCLUSIONS OF LAW 2.4 as fully set forth herein at page 7.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether a conviction for failure to register as a sexual offender pursuant to an information that fails to allege all of the elements of the offense must be reversed and dismissed?
[Assignment of Error No. 1]
02. Whether there was sufficient evidence Watkins attempted to induce Dale Watkins, his father, to testify falsely or to withhold relevant testimony?
[Assignments of Error Nos. 2-4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Malachi M. Watkins was charged by amended

information filed in Clark County Superior Court September 24, 2015, with failure to register as a sex offender with one prior offense, count I, and tampering with a witness, count II, contrary to RCWs 9A.44.132(1)(b) and 9A.72.120(1). [CP 2].

On September 28, the parties entered into the following AGREED

STIPULATION TO FACTS FOR TRIAL:

THE DEFENDANT AND THE STATE
STIPULATE THAT:

- 1) The person before the Court on the current case who has been identified as Malachi Mark Watkins was convicted on February 7, 2001, and sentenced on July 11, 2001, in Washington State under Clark County Superior Court Juvenile Cause Number 01-8-00119-7, for the following crimes: Child Molestation in the First Degree, RCW 9A.44.083, a class A felony sex offense, committed between July 1, 2000, and December 31, 2000; Child Molestation in the First Degree, RCW 9A.44.083, a class A felony sex offense, committed between January 1, 1997, and July 31, 1999; Child Molestation in the First Degree, RCW 9A.44.083, a class A felony sex offense, committed between January 1, 1997, and January 31, 1999; Incest in the First Degree, RCW 9A.64.020(1), a class B felony sex offense, committed between January 1, 1997, and January 31, 1999.
- 2) The person before the Court on the current case who has been identified as Malachi Mark Watkins was convicted and sentenced in Washington State on November 26, 2001,

under Clark County Superior Court Juvenile Cause Number 01-8-01163-0, for the following crime, Failure to Register as a Sex Offender, RCW 9A.44.130 (1), (4), (6), (7), a class C felony, committed on October 3, 2001.

[CP 5-6].

The CrR 3.5 hearing was incorporated into Watkins's bench trial, following which his pretrial statements were ruled admissible, he was found guilty, and the court entered the following FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CrR 3.5 HEARING AND BENCH TRIAL:

I. FINDINGS OF FACT

- 1.1 The Defendant was convicted on February 7, 2001, and sentenced on July 11, 2001, in Washington State under Clark County Superior Court Juvenile Cause Number 01-8-00119-7, for the following crimes: Child Molestation in the First Degree, RCW 9A.44.083, a class A felony sex offense, committed between July 1, 2000, and December 31, 2000; Child Molestation in the First Degree, RCW 9A.44.083, a class A felony sex offense, committed between January 1, 1997, and July 31, 1999; Child Molestation in the First Degree, RCW 9A.44.083, a class A felony sex offense, committed between January 1, 1997, and January 31, 1999; Incest in the First Degree, RCW 9A.64.020(1), a class B felony sex offense, committed between January 1, 1997, and January 31, 1999.

- 1.2 Due to these convictions, the Defendant was required to register in the State of Washington, County of Clark, as a sex offender between June 15, 2015, and July 4, 2015.
- 1.3 The Defendant was convicted and sentenced in Washington State on November 26, 2001, under Clark County Superior Court Juvenile Cause Number 01-8-01163-0, for the following crime, Failure to Register as a Sex Offender, RCW 9A.44.130 (1), (4), (6), (7), a class C felony, committed on October 3, 2001.
- 1.4 On more than one occasion prior to June 5, 2015, the Defendant received notice of the duty to register as a sex offender.
- 1.5 On March 3, 2015, the Defendant reported in person to the Clark County Sheriff's Office and registered as a sex offender living at 1750 NW Brady Rd., Camas, WA, located in Clark County; at that time, the Defendant was living at that address with the Defendant's father and mother.
- 1.6 On a date after June 5, 2015, but at least two weeks prior to July 4, 2015, the Defendant stopped using the residence at 1750 NW Brady Rd., Camas, WA, as living quarters; at that point in time, 1750 NW Brady Rd., Camas, WA, ceased to be the fixed residence of the Defendant; the Defendant did not notify the Clark County Sheriff's Office within three business days, or at any time thereafter, that he ceased to have a fixed residence or that he had changed his address; the Defendant knowingly failed to comply with a requirement of sex offender registration.

- 1.7 On July 4, 2015, Detective Bieber contacted and interviewed Dale Watkins at 1750 NW Brady Rd., Camas, WA; on that date, Dale Watkins made statements to Detective Bieber about the Defendant's living situation.
- 1.8 At trial, Dale Watkins testified that he did not see the Defendant at 1750 NW Brady Rd., Camas, WA, for a period of at least two weeks prior to July 4, 2015.
- 1.9 On June 22, 2015 Portland Police Bureau Officer John Maul contacted the Defendant in the parking lot of Taco Bell on SE Stark Street in Portland, Oregon, in the vicinity of Interstate 205; Officer Maul observed the Defendant going through property near a truck; Officer Maul asked the Defendant for identifying information and the Defendant provided date of birth, first name, and said his last name was "Watson"; Officer Maul returned to his vehicle and searched unsuccessfully in his database using the information provided by the Defendant; Officer Maul then contacted the Defendant and told the Defendant that he thought the Defendant gave false identity; the Defendant then admitted he had lied because he thought he had a warrant for his arrest; up to that point, Officer Maul did not physically restrain the Defendant's movements; Officer Maul next placed the Defendant into handcuffs and detained him while searching the database with the Defendant correct name; Officer Maul determined that the Defendant did not have a warrant and released him; the Defendant appeared surprised when Officer Maul released him.

- 1.10 In the early morning of July 7, 2015, Portland Police arrested the Defendant in Portland, Oregon.
- 1.11 While incarcerated at the Clark County Jail, the Defendant called the cell phone of his mother and spoke with her on July 29, 2015; during this conversation, the Defendant stated that his father, Dale Watkins, could recant his prior statement to Detective Bieber about the Defendant's living situation;
- 1.12 On August 22, 2015, while incarcerated, the Defendant called his mother on her cell phone while she was traveling in a car with husband, Dale Watkins; during the conversation, the Defendant stated that Dale Watkins could recant his statement to Detective Bieber; Dale Watkins was able to hear the Defendant make this statement, which caused Dale Watkins to believe the Defendant wanted him to recant his prior statements to Detective Bieber.
- 1.13 The Court incorporates by reference the contents of the audio recordings of both phone calls contained in Exhibit 1, admitted at trial.
- 1.14 The Court incorporates by reference its oral findings made on September 29, 2015.

II. CONCLUSIONS OF LAW

- 2.1 The court has jurisdiction over the Defendant and the subject matter of this action.
- 2.2 On June 22, 2015, the Defendant was not in

custody prior to being placed in handcuffs by Officer Maul; the Defendant voluntarily made statements to Officer Maul prior to being placed in handcuffs; the Defendant's statements to Officer Maul are admissible under CrR 3.5.

2.3 The Defendant is guilty of the crime of Failure to Register as a Sex Offender as charged in Count 1 of the Amended Information.

2.4 The Defendant is guilty of Tampering with a Witness as charged in Count II of the Amended Information.

[CP 26-29].

Watkins was sentenced within his standard range and timely notice of this appeal followed. [CP 8-25].

02. Bench Trial

02.1 Failure to Register

On March 3, 2015, Detective Barry Folsom, a member of the Clark County sex offender registration unit, reviewed the unit's one-year verification form with Watkins, who listed his registered address as 1750 Northwest Brady Road, Camas, Washington. [RP 78-79, 83-84]. Watkins was told that if he changed his address, "to come in person within three days." [RP 84].

They can do a change of address in person at the office, or they can send a certified letter recording

where they've moved and that they've notified us
that they've moved.

[RP 85]. Watkins never notified the sex offender unit of a change of
address. [RP 85, 87].

On July 4, Detective Brianne Bieber went to 1750 Northwest
Bundy Road to do a sex offender registration check on Watkins to make
sure he was still living there. [RP 61-62]. She was told by Dale Watkins,
Watkins's father, that his son "was not living there and that he hadn't lived
there for about a month. He was residing somewhere in Portland, but he
didn't have contact information for him." [RP 63].

Dale Watkins never saw his son for "probably a week or two at
least" before July 4. [RP 33, 35]. "[I]t could have been two or three weeks
... I hadn't seen him for a while." [RP 36].

Watkins was taken into custody in Portland, Oregon, July 7. [RP
76]. He stipulated to his prior convictions for felony sex offenses, which
included a conviction for failure to register as a sex offender. [CP 5-6].

02.2 Tampering with a Witness

Dale Watkins confirmed that his wife's cell
number is 360-635-1417. [RP 37]. He listened to two calls from the
county jail made July 29 and August 22 and identified the voices as
belonging to his wife and son. [RP 39, 42]. He also acknowledged that he

was the third voice on the August 22 call: "That sounded like me. Yeah, that might - - that must have been me there, yeah." [RP 43]. He understood his son's comments during this call as an indication of his desire for him to take back the statement he had made to Detective Brianne Bieber on July 4, that his son didn't live at his residence at that time. [RP 29-30, 47].

During the July 29 call, Mrs. Watkins told her son "that they came looking for you, dad did sign a paper that said that you didn't live here anymore." [RP 105].

MR. WATKINS: Yeah, I was going to talk to you about that.

MRS. WATKINS: Well, I mean, I think he got caught up in the fact that the officer was female and was polite and personable with him as opposed to that last guy that was here that was basically the opposite of that.

MR. WATKINS: Right. Well, there you go.

MRS. WATKINS: And - -

MR. WATKINS: And there's a reason to recant your statement.

MRS. WATKINS: Oh, yeah.

MR. WATKINS: Stuff gets thrown out all the time because of recanted statements.

MRS. WATKINS: Yeah.

MR. WATKINS: And, you know, it's - -

MRS. WATKINS: Yeah, I don't - -

MR. WATKINS: That's all. We don't need to talk about it over the phone. And they - -

MRS. WATKINS: Yeah.

MR. WATKINS: - - record it. They probably just - - you know what I mean. I'm not - -

MRS. WATKINS: Yeah.

MR. WATKINS: - - guilty anyway, so we'll see. We will see

[RP 105-06].

During the August 22 telephone conversation, Watkins mentioned that his attorney was bringing him "the statement or whatever that dad signed or wrote or whatever that is - - " [RP 132].

MRS. WATKINS: Yeah.

MR. WATKINS: - - that - -

MRS. WATKINS: He wasn't thinking.

MR. WATKINS: Yeah, I know that's something that can - - you know. I'm - - I'm - - I don't know for sure if - - anybody can get in trouble but recant the statement. I'm pretty sure you can do that, like, say, hey, no more of this statement, you know, but we'll see. I'll talk to my lawyer and ask him about it a little bit and see what he has to say about that.

MRS. WATKINS: Yeah.

MR. WATKINS: Because to me it's like - -

MRS. WATKINS: It was - - it wasn't just a statement. He actually signed some papers.

MR. WATKINS: Well, yeah, but did he write it, or did she write it?

MRS. WATKINS: I don't know.

MR. WATKINS: Or if - - because I'm thinking if she printed it, then he just signed - - he read it and signed it or whatever, that's it, like how is that - - how is that going to hold up against - - you know what I mean? How is someone's signature going to be enough to convince a judge beyond a reasonable doubt, you know.

MR. D. WATKINS: She asked me if you lived there. I said no.

MR. WATKINS: Yeah.

MR. D. WATKINS: She had some paperwork there, and I signed (inaudible).

MR. WATKINS: Yeah. No, I - - I - - yeah, I understand. I'm just trying to think ahead and see, you know, because to me that's all they have going - - you know, going on there side really.

[RP 132-33].

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D. ARGUMENT

01. A CONVICTION FOR FAILURE TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in favor of validity....” Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was

nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question “is whether the words would reasonably apprise an accused of the elements of the crime charged.” Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

Here, the information charging Watkins with failure to register reads as follows:

That he, MALACHI MARK WATKINS, in the County of Clark, State of Washington, on or about and between June 5, 2015 and July 4, 2015, having a duty to register under RCW 9A.44.130 for a felony sex offense as defined in that section, to-wit: Clark County Superior Court Cause No. 01-

8-00119-7 – Child Molestation in the First Degree (3 counts) and Incest, and having been convicted in this state or pursuant to the laws of another state of a felony failure to register as a sex offender on one prior occasion, to-wit: Clark County Superior Court Cause No. 01-8-01163-0, did knowingly fail to comply with any of the requirements of RCW 9A.44.130; contrary to Revised Code of Washington 9A.44.132(1)(a)

[CP 2].

This information failed to apprise Watkins of the nature of the charge. It did not allege that he knowingly failed to register, instead referencing his failure to comply with the requirements of RCW 9A.44.130. See State v. Brosius, 154 Wn. App. 714, 722 n.8, 225 P.3d 1049 (2010) (citing elements of offense as (1) knowingly (2) failing to register). The information is thus defective, given that mere citation to a statute is insufficient to allege a violation of its contents. State v. Naillieux, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010). “[D]efendants should not have to search for the rules or regulations they are accused of violating.” State v. Kjorsvik, 117 Wn.2d at 101.

Because no fair reading of the information disclosed that Watkins knowingly failed to register, the conviction obtained on this charge must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Watkins need not show prejudice, since Kjorsvik calls for a

review of prejudice only if the “liberal interpretation” upholds the validity of the information. See State v. Kjorsvik, 117 Wn.2d at 105-06.

02. THERE WAS INSUFFICIENT EVIDENCE
THAT WATKINS ATTEMPTED TO INDUCE
DALE WATKINS, HIS FATHER, TO TESTIFY
FALSELY OR TO WITHHOLD RELEVANT
TESTIMONY.

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

To convict Watkins of tampering with a witness, the State had to prove that he attempted to induce Dale Watkins, his father, to testify falsely or to withhold relevant testimony. RCW 9A.72.120(1)(a); See State v. Williamson, 131 Wn. App. 1, 6, 86 P.3d 1221 (2004) (a person tampers with a witness if he or she attempts to alter the witness's testimony).

As set forth supra at 9-11, the State's evidence was drawn from statements made by Watkins during two telephone conversations he made while incarcerated at the county jail. During the July 29 conversation, Watkins made a general statement to his mother that "stuff gets thrown out all the time because of recanted statements." [RP 106]. Approximately three weeks later, August 22, in responding to his mother's comment that Watkins's father "wasn't thinking" when he talked to the police [RP 132], Watkins stated that he didn't "know for sure" if "anybody" could get in trouble by recanting a statement but that he would "talk to my lawyer and ask him about it a little bit and see what he has to say." [RP 132]. Dale Watkins was a party to this conversation. [RP 132-34].

An attempt to induce a witness does not depend solely on the literal meaning of the words used. State v. Rampel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). And "induced," as used in the witness tampering statute, does not require proof of a threat or offer of reward. Id. In Rampel, the defendant called the rape victim several times from jail and told her he

was sorry and asked her to drop the charges. He also told her that it was going to ruin his life, and that he would not do it again. Id. at 81. The Washington Supreme Court held this evidence insufficient to establish that Rampel had attempted to induce the victim to testify falsely or to withhold testimony, reasoning, in part, that “[t]he words ‘drop the charges’ reflect a lay person’s perception that the complaining witness can cause a prosecution to be discontinued.” Id. at 83.

Likewise, no evidence was presented that Watkins asked his father to testify falsely or to withhold evidence, which falls short of the situation in State v. Lubers, 81 Wn. App. 614, 622-23, 915 P.2d 1157, reviewed denied, 130 Wn.2d 1008 (1996), where this court found sufficient evidence of tampering based on testimony that the defendant had asked a witness to make a false statement and thereby effectively recant a prior signed statement the witness had given to the police. Nor is this case similar to State v. Sanders, 66 Wn. App. 878, 890, 833 P.2d 452, review denied, 120 Wn.2d 1027 (1993), where there was sufficient evidence on the basis of the defendant having arranged and paid for the child rape victim’s family to take her out of state so she would be unavailable for trial.

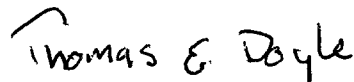
In contrast, the State failed to prove that Watkins attempted to induce his father to testify falsely or to withhold any testimony. He never

asked him to either change what he had to say or to withhold relevant testimony. This is not the case where he was repeatedly asked his dad for help. He spoke to him one time on the phone. He wasn't asking for anything and he wasn't promising anything. He didn't know anything "for sure" and left it with a "we'll see." He wanted to run things by his lawyer to see "what he has to say" [RP 133]. This evidence was not sufficient to support the witness tampering conviction.

E. CONCLUSION

Watkins respectfully requests this court to reverse and dismiss his convictions consistent with the arguments presented herein.

DATED this 18th day of April 2016.

Handwritten signature of Thomas E. Doyle in black ink.

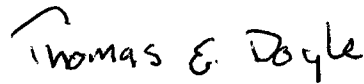
THOMAS E. DOYLE
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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Anne M. Cruser	Malachi M. Watkins #896669
Prosecutor@Clark.wa.gov	Stafford Creek Corrections Center
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DATED this 18th day of April 2016.



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DOYLE LAW OFFICE

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